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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAI`I

VINCENT KHOURY TYLOR and VINCENT SCOTT TYLOR, Plaintiffs, v. MARRIOTT INTERNATIONAL, INC., a Delaware Corporation, dba COURTYARD BY MARRIOTT WAIKIKI BEACH AND/OR COURTYARD WAIKIKI BEACH; JOHN DOES 1-10; JANE DOES 1-10;	)	Case No. CV 14-00069 JMS-RLP **DEFENDANT MARRIOTT INTERNATIONAL, INC.'S MEMORANDUM IN OPPOSITION TO *PLAINTIFFS' FIRST MOTION FOR LEAVE TO AMEND COMPLAINT AND ADD PARTIES***; DECLARATION OF GLENN T. MELCHINGER; EXHIBIT "1"; DECLARATION OF PHILIP A. BORKOWSKI; DECLARATION OF CHRISTOPHER TATUM;

DOE CORPORATIONS 1-10; DOE PARTNERSHIPS 1-10; AND DOES ASSOCIATIONS 1-10, Defendants.	))))))	CERTIFICATE OF SERVICE [Dkt. No. 19] **NON-HEARING MOTION** **JUDGE:** Hon. Richard L. Puglisi **TRIAL DATE:** July 28, 2015 **JUDGE:** Hon. J. Michael Seabright

DEFENDANT MARRIOTT INTERNATIONAL, INC.'S MEMORANDUM IN OPPOSITION TO *PLAINTIFFS' FIRST MOTION FOR LEAVE TO AMEND COMPLAINT AND ADD PARTIES*

Defendant Marriott International, Inc. ("Defendant" or "Marriott"), by and through its attorneys, Alston Hunt Floyd & Ing and Andrews Kurth LLP, respectfully submit this opposition to *Plaintiffs' First Motion for Leave to Amend Complaint and Add Parties*, filed on Saturday, September 20, 2014. [Dkt. 19].

I. INTRODUCTION

Plaintiffs' Motion seeks to add claims and parties pursuant to Rules 15(a)(2) and 20(a)(2). Dkt 19 (the "Motion"). The Motion fails because the proposed First Amended Complaint ("FAC") does not satisfy the requirements of FRCP 20(a)(2)(A) and (B). Specifically, the rights to relief that Plaintiffs assert against the proposed defendants are not asserted jointly or severally, and even if they were, the claims regarding each property involve disparate actors and images and occurred at different times and on different social media and websites. They do not arise "out of the same transaction, occurrence or series of transactions or occurrences." Fed. R. Civ. P. ("FRCP") 20(a)(2)(A). Plaintiffs provide no authority that supports joinder under the facts alleged. Plaintiffs' proposed FAC also improperly and implausibly seeks to lump a host of different theories together in a single paragraph without sufficient allegations. Such an amendment would be futile.

Accordingly, the proposed FAC should be rejected.

II. BACKGROUND

A. The Proposed FAC Seeks To Lump Together Unrelated Claims.

Marriott is an operator, franchisor, and licensor of hotels and timeshare properties under numerous brand names. Decl. of Chris Tatum ("Tatum Decl.") at ¶ 4. Marriott typically manages or franchises hotels, rather than owns them. *Id*. A "managed" hotel is hotel where the day-to-day business of the hotel is operated by Marriott (or an affiliate) pursuant to a hotel management agreement between Marriott (or the affiliate) and the hotel owner. *Id*. Unlike a managed hotel, Marriott does not manage the day-to-day business of "franchised" hotels. *Id*. Instead, a "franchised" hotel is owned and operated by an independent contractor. *Id*. Marriott licenses the use of a brand name to the franchisee pursuant to a franchise agreement, but the hotel operations are managed by the franchisee or a third-party management company with whom the franchisee contracts. *Id*.

The current Complaint concerns only the Courtyard Waikiki Beach Marriott ("Waikiki Beach"), which is a franchised hotel; Marriott does not own or operate Waikiki Beach or have any employees at the hotel.[1] Plaintiffs' proposed amendments concern three new and *different* hotels: one franchised hotel and two managed hotels. Each of the four hotels Plaintiffs propose to incorporate into one lawsuit are owned and operated by different entities. The franchisees, managers, employees, and vendors are all different. The social media channels on which the different hotels allegedly posted, pinned, repinned or linked to copyrighted images are all separate and independent. A chart of the new claims, allegedly infringed images and parties Plaintiffs propose to add is provided in the attached Exhibit "1." The chart underscores the lack of relationship among the parties and claims. A summary of the disparate claims the Plaintiffs seek to bring in the proposed FAC is set forth below.

First, Marriott's only connection with *all* the claims in the proposed FAC is that "Marriott" is the "flag" or brand name on the various properties. The proposed FAC asks this Court to allow new claims related to (a) three new

[1] It is because Marriott International, Inc. is *not* the real party in interest that Plaintiffs seek in this Motion both to join RP/LCPB Waikiki Hotel Owner LLC ("RP/LCPB"), as well as seeking to add new claims against Marriott. Counsel identified of RP/LCPB to Plaintiffs in March, 2014. As Plaintiffs have been informed, there was a change in ownership and RP/LCPB assigned its rights to the hotel to a separate and independent entity in June 2013. *See* Decl. of P. Borkowski at ¶ 7.

properties and (b) seven new images that are unrelated to the Waikiki Beach property. The three properties are: the Courtyard Maui Kahului Airport ("Kahului"), the Waikoloa Beach Marriott Resort & Spa ("Waikoloa"), and Courtyard Kauai At Coconut Beach ("Coconut Beach"). Waikiki Beach and Coconut Beach are both franchised properties owned and operated by separate franchisees. Decl. of Philip A. Borkowski at ¶¶ 5-11. The franchisee of Coconut Beach is Kauai Coconut Beach Operators, LLC. *Id*. at ¶ 8. Kahului and Waikoloa are not managed by the Defendant Marriott International, Inc. Tatum Decl. at ¶¶ 4, 6-9. Rather, Kahului is managed by Courtyard Management Corporation, Waikoloa is managed by Marriott Hotel Services, Inc., and Waikoloa's social media and online presence is outsourced to a third party vendor. Tatum Decl. at ¶ 9. In sum, each set of claims regarding the three new properties involves completely different entities, actors, and events from those involved in the Waikiki Beach claims.

Second, Plaintiff Vincent Scott Tylor is not a named plaintiff (not a proper or necessary party) to any of the new claims in the proposed FAC. *See* Melchinger Decl. at Ex. "1" (spreadsheet analyzing the images and properties involved in the Proposed FAC). The new claims pertain solely to Plaintiff Vincent Khoury Tylor's images.

Third, only one image sought to be put at issue by Plaintiffs was used on more than one property's social media channels.[2] Instead, the new allegations concern images that were not allegedly used by Waikiki Beach. In short, the new claims are based on new images, allegedly used at different properties, by different parties, on different social media platforms, at different times. The proposed FAC alleges that the *0-23 Waikiki Dusk* image was used on Coconut Beach's Facebook page as well as at Waikiki Beach's Pinterest pinboard. Proposed FAC at ¶¶ 21, 27, & 37; Melchinger Decl. at Ex. "1." In short, that image was used at two franchised properties, by two different franchisees, on two different social media platforms, at different times. *Id.*

The chart in Exhibit "1" clearly shows that the claims in the proposed FAC are not part of the same transaction or occurrence.

B. The Alleged "Necessity" of Litigation.

Plaintiffs allege in ¶47 of the proposed FAC that a lawsuit was a necessity. This is an unfortunate and baseless allegation. Coconut Beach and Kahului received demand letters dated July 29, 2014, as alleged, however, Plaintiffs' counsel failed to make any good faith or meaningful effort to avoid

[2] The proposed FAC alleges that the *0-23 Waikiki Dusk* image was used on Coconut Beach's Facebook page as well as at Waikiki Beach's Pinterest pinboard. Proposed FAC at ¶ ¶ 21, 27, & 37; Melchinger Decl. at Ex. "1." As described above, Waikiki Beach and Coconut Beach are two separate franchised properties, with two different franchisees, and the allegations relate to different uses, at different times, on different social media platforms.

litigation. Counsel for Kahului spoke with Plaintiffs' counsel regarding the letter and made a good faith effort to avoid litigation. Plaintiffs' counsel promised to get back to counsel for Kahului – and counsel for Kahului subsequently reached out to Plaintiffs' counsel several times – but Plaintiffs' counsel never returned those communications. Likewise, Marriott has been informed that a representative of the Coconut Beach's franchisee's insurer contacted Plaintiffs' counsel regarding that demand letter, but Plaintiffs' counsel never returned that contact. As for Waikoloa, no demand was ever made (and none is alleged in the proposed FAC).

Plaintiffs' counsel was informed prior to the filing of this Motion that the properties were unrelated and only bore the Marriott *flag*. Nevertheless, in an obvious attempt to obtain a windfall by confusing and complicating this matter, Plaintiffs' counsel filed this Motion seeking to lump several disparate claims into an unrelated matter.

C. Discovery.

On August 29, 2014, Marriott circulated a proposed stipulated protective order ("SPO") to Plaintiffs. Upon entry of an SPO, Marriott hoped to exchange documents, including delivering confidential franchise documents to Plaintiffs' counsel to establish that Marriott is not the real party in interest. On October 2, 2014, Plaintiffs served their first discovery request on Marriott.

Plaintiffs did not respond or comment on the SPO until 11:15 AM on October 6, 2014.[3]

III. STANDARD OF REVIEW

Rule 20(a)(2) of the FRCP provides that persons may be joined together in one action as defendants if:

> (A) any right to relief is asserted against them jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions and occurrences; ***and***
>
> (B) any question of law or fact common to all defendants will arise in the action.

FRCP Rule 20(a)(2). As Plaintiffs note: "[E]ven once the Rule 20(a) requirements are met, a district court must examine whether permissive joinder would comport with the principles of fundamental fairness or would result in prejudice to either side." *Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1296 (9th Cir. 2000) (internal quotes and citations omitted). Inserting a number of parties is improper where "joinder would instead confuse and complicate the issues for all parties involved." *Wynn v. NBC*, 234 F. Supp. 2d 1067, 1088 (C.D. Cal. 2002). Leave to amend "need not be granted when the proposed amendment is futile." *See Nordyke v. King*, 644 F.3d 776, 788, n.12 (9th Cir. 2011) (vacated on other grounds). Thus the "proper test to be applied when

[3] It is proper to put off discovery until the parties' pending motions for partial summary judgment under the authority provided in Marriott's opposition to Plaintiffs Rule 56(d) motion filed contemporaneously. *See* Dkt 37, at 8, n.1.

determining the legal sufficiency of a proposed amendment is identical to the one used when considering the sufficiency of a pleading challenged under Rule 12(b)(6)." *Id*. Accordingly, the proper inquiry is whether the facts state a *plausible* claim for relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

IV. ARGUMENT

A. Plaintiffs Fail To Satisfy The Requirements Of Rule 20(a).

Plaintiffs *argue* in their memorandum that the proposed defendants are "jointly, severally, or alternatively liable" [*SIC*] based solely on "information and belief." Mem. In Supp. ("MIS") at 3. The proposed FAC, however, fails to allege any claim for joint or several liability. This leaves only the question of whether the proposed FAC alleges "in the alternative" a set of claims arising out of the same transaction or occurrence. FRCP 20(a)(2)(A). It does not.

On the contrary, each set of claims is a distinct set of allegations concerning different acts by different people, related to different resort properties (all on different islands), by different entities, on different websites, involving different social media channels, software and technologies, at different times in varying degrees. Plaintiffs fail to provide this Court with any authority that supports joinder under the facts pled in the proposed FAC. *See* Melchinger Decl. at Ex. "1."

The fact that Plaintiffs incorrectly sued Marriott in this action in the first place and now seek to add two properties managed in turn by Courtyard Management Corporation and Marriott Hotel Services, Inc. does not justify joining all these disparate claims together in this action. The "transaction or occurrence" is not the same. In fact, the *sole* common thread in all the proposed claims is that the "Marriott" flag is flown on the properties. Plaintiffs' attempt to lump disparate claims and parties together based on a common brand does not satisfy FRCP 20(a).

Even if Plaintiffs were to have alleged that the proposed defendants infringed the same copyrighted work using the same media channel, that would be insufficient to satisfy the joinder requirements. That is because downloading even the same copyrighted work at different times is not the same "transaction or occurrence" for the purposes of FRCP 20(a). *See Hard Drive Prods. v. Does 1-188*, 809 F. Supp. 2d 1150, 1163 (N.D. Cal. 2011) (rejecting the joinder of defendants where several attempted to download the same copyrighted work through the same means, BitTorrent).

Hard Drive is dispositive of the issues presented in the proposed FAC. Here, different people at different properties (on different islands) downloaded different images at different times and used different social media in the alleged infringement. Plaintiffs do not allege joint or several liability, and the "transaction or occurrence" test is not satisfied. For this reason alone, the proposed FAC fails. But there is more.

B. The Proposed FAC Will Prejudice the Defendants.

Even if Plaintiffs could satisfy Rule 20(a)'s requirements, the proposed joinder must fail because it will prejudice the Defendants. The practical impact of the proposed FAC will be that the comparatively lesser infringement claims (involving only one or two images) will be held hostage to the claims already on file, and that unrelated franchisee hotel operators and Courtyard Management Corporation and Marriott Hotel Services, Inc. will be joined to defend against unrelated claims. For example, Defendants would be required to coordinate their defenses and discovery, resulting in such wastes of time as sitting in on depositions of unrelated claims, where they have nothing at stake, if for nothing more than to object to Plaintiffs' inevitable attempts to connect four unrelated sets of events.

Plaintiffs hope to amass a number of unrelated claims in order to create some sort of taint on "Marriott," but "[a] lumping together of such claims, which amounts to guilt by association, would unfairly prejudice the defendants." *Wynn*, 234 F. Supp. 2d at 1089 (quoting from *Sidari v. Orleans County*, 174 F.R.D. 275, 282 (W.D.N.Y. 1996)). This practice is especially egregious where there is just one tenuous link, a brand or "flag."

Each claim against the separate properties should be judged on its own facts, and unrelated Defendants should not be inefficiently lumped together via improperly joined allegations. "Experience teaches that, unless cases are pled clearly and precisely, issues are not joined, discovery is not controlled, the trial court's docket becomes unmanageable, the litigants suffer, and society loses confidence in the court's ability to administer justice." *Id.* at 1088.

C. The Amendment Proposed In Paragraph 55 Is Futile And Should Be Rejected.

Plaintiffs also lump together in the proposed FAC in conclusory fashion a host of legal theories that are all pre-empted by the Copyright Act, and which fail to state a proper claim under *Iqbal*. Specifically, ¶ 55 in the proposed FAC states:

> 55. Defendants, by their unauthorized appropriation and use of Plaintiffs' original photographic works, have been and are engaging in acts of *unfair competition, unlawful appropriation, unjust enrichment, wrongful deception or the purchasing public, and unlawful trading on Plaintiffs' goodwill and the public acceptance of Plaintiffs' original photographic works*.

Dkt. 19-2 at ¶ 55 (emphasis added).

1. Proposed ¶ 55 fails to satisfy *Iqbal*.

The set of allegations in ¶ 55 is, first and foremost, implausible because it fails to set forth *any* specific facts that support these varied claims. *Iqbal*, 556 U.S. at 678. For example, no proposed defendant is alleged to be a photographer in competition with Plaintiffs, but all the defendants are inexplicably accused of "unfair competition" with *both* Plaintiffs, even though Plaintiff Vincent Scott Tylor's images have nothing to do with the proposed new claims.

The allegation of "wrongful deception" also violates the requirements of FRCP 9(b) that fraud should be pled with particularity. Nowhere does the proposed FAC state what alleged "deception" is occurring here with any particularity. *See Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1125 (9th Cir 2009) (FRCP 9(b) applies to state law claims pled in USDC and required pleading with particularity).

2. The "claims" listed in proposed ¶ 55 are pre-empted.

Finally (as Plaintiffs' counsel should well know) the federal Copyright Act pre-empts the state law "claims" in proposed ¶ 55. "To survive preemption, the state cause of action must protect rights which are qualitatively different from the copyright rights." *See Del Madera Properties v. Rhodes & Gardner, Inc.*, 820 F.2d 973, 977 (9th Cir. 1987). The putative "claims" for "unjust enrichment" and "unfair competition" are expressly pre-empted. *See Id.* (Copyright Act claims pre-empt unfair competition and unjust enrichment claims).

Ultimately, even if the Court viewed the proposed ¶ 55 as individual "claims" that somehow satisfied *Iqbal*, Plaintiffs merely list the *name* of claims (*e.g.*, "unfair competition") and do not plead those claims, supporting facts, or show any right that is "qualitatively different" from copyright. These proposed allegations fail. The allegations in ¶ 55 are futile and should be rejected.

V. CONCLUSION

Plaintiffs' proposed FAC lumps together disparate facts, parties, and legal theories that should be kept separate. Despite bearing the Marriott flag, the proposed defendants are unrelated entities. The alleged acts of infringement do not arise out of the same transaction or occurrence. Joinder is improper, and thus, the motion should be denied.

Dated: Honolulu, Hawai`i, October 6, 2014.

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